

# How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking

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## *Abstract*

*In this paper I address a vexing, but curiously understudied subject: How do mediators decide what to do under the volatile, unpredictable, and fast moving circumstances under which they work? There are two familiar responses to this question. One is that mediator decisionmaking is “intuitive,” especially for highly experienced professionals. Another is couched in terms of mediator identification with some formal model of practice such as facilitative or transformative mediation. There are good reasons to believe that neither intuition nor reliance on a formal model provide a satisfying answer to questions about mediator decisionmaking. I summarize the findings from three in-depth studies using reflective case study methods that suggest a more complete answer to the question. These studies include an investigation of divorce mediation,<sup>1</sup> a study of the work of ombuds-mediators working at the National Institutes of Health,<sup>2</sup> and a study of mediators brought into the psychology laboratory to mediate a simulated conflict between two college roommates.<sup>3</sup> We have learned from these investigations that tacit knowledge—which we have variously described under headings like mediator “styles,” “mental models,” or “schemas of practice,”—plays a powerful role in such decisionmaking, is often at striking variance with what practitioners consciously believe they are doing, and can be gotten at by methods that help practitioners access their tacit decisionmaking knowledge. The methodological and practical implications*

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<sup>1</sup> Kenneth Kressel, Edward A. Frontera, Samuel Forlenza, Frances Butler & Linda Fish, *The Settlement Orientation vs. the Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67 (1994).

<sup>2</sup> Kenneth Kressel & Howard Gadlin, *Mediating Among Scientists: A Mental Model of Expert Practice*, 2 NEGOT. CONFLICT MGMT. RESOL. 308 (2009).

<sup>3</sup> See generally Kenneth Kressel, Tiffany Butts, Warren Reich & Claudia Cohen, *A Multidimensional Analysis of Conflict Mediator Style*, 30 CONFLICT RESOL. Q. 135 (2012); T. Peleg-Baker, Kenneth Kressel & C. Cohen, *Beyond the Dichotomy of Styles: The Cognitive Characteristics of Mediators' Decision Making* (poster presented at the American Bar Association Section on Dispute Resolution Annual Conference, Washington, D.C.), Apr. 2012.

*of these findings for future research on mediator decisionmaking are considered.*

In this paper I address a vexing, but curiously understudied subject: *How do mediators decide what to do under the volatile, unpredictable, and fast moving circumstances in which they work?* I refer to conundrums like: “Should I intervene now or wait?” “If I decide to intervene, what should I say and how should I say it?” “Oops! Didn’t expect him to say that! Now what do I say?”

There are two familiar responses to these kinds of questions. One is that mediator decisionmaking is “intuitive,” especially for highly experienced professionals. It was a familiar theme among the New York City labor mediators I interviewed about their work way back in the 1970s when I first began studying the mediation process<sup>4</sup> and I have heard it often since then.

Another common response is couched in terms of mediator identification with some formal model of the mediation role—e.g. “I am a transformative mediator so I make decisions based on what will lead to empowerment and recognition,” or “I am a facilitative mediator, so I decide on interventions that will promote a ‘win/win.’” As mediation has become more professionalized, formal models of practice are invoked frequently as the basis for mediator decisionmaking.

However, there are good reasons to believe that neither of these responses provides a fully satisfying answer to questions about mediator decisionmaking. In this paper I will summarize the findings from three in-depth studies that my colleagues and I have done over a period of 20 years—this kind of research is slow—that bear directly on the question of how mediators decide what to do on a moment-by-moment basis.

The three investigations include a study of divorce mediation conducted in a family court;<sup>5</sup> an investigation of the work of ombuds-mediators managing conflicts among scientists working at the National Institutes of Health<sup>6</sup> and a study of mediators brought into the psychology laboratory to mediate a simulated conflict between two college roommates. All three investigations used case-based methods and focused on mediator cognition, particularly implicit, nonconscious cognition. All of them bore in one-way or another on the question: “What must the mediator have been thinking to have done *that*?”

My main theme will be that mediator decisionmaking is the product of largely unconscious and highly personal ideas that mediators hold about the

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<sup>4</sup> KENNETH KRESSEL, LABOR MEDIATION: AN EXPLORATORY SURVEY (1972).

<sup>5</sup> Kressel et al., *supra* note 1.

<sup>6</sup> Kressel & Gadlin, *supra* note 2.

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nature of conflict, the goals to be attained by intervention, and implicit intervention “scripts.” It is my hypothesis that these tacit ideas appear to be a more powerful determinant of what occurs in mediation than the formal models of mediation practice we are familiar with.

My purpose is not only to describe what we have learned about the complexities of mediator decisionmaking. For a long time, it has been very clear that there is an enormous gap between what mediation researchers do and what mediation practitioners care about. I want to use the research experiences that I will summarize to suggest research that will be of genuine interest to practicing mediators and that may even get them involved as active research collaborators. (Maybe things will go faster if more hands are on deck).

### I. THE ESSEX COUNTY DIVORCE MEDIATION STUDY: THE PROBLEM-SOLVING STYLE VS. THE SETTLEMENT ORIENTED STYLE

The divorce mediation study was my introduction to the challenges of doing practice-relevant research. It was funded by the New Jersey Administrative Office of the Courts as part of the New Jersey Supreme Court’s efforts to assess the suitability of mediation as an adjunct to the traditional exclusive reliance on lawyers. The idea seems quaint by today’s standards, but at the time the specter of court-endorsed divorce mediation represented the end of life on Earth as we know it for many members of the organized bar.

The project team consisted of an attorney, Linda Fish, two court probation officers, Sam Forlenza and Fran Butler, and myself. The project had as its goal developing a workable approach to divorce mediation through a process of reflective team debriefings. Little did I suspect that the approach to divorce mediation we sought to develop was already largely there, waiting to be discovered, principally in the mind of Fran Butler.<sup>7</sup>

Some three years and nearly fifty case debriefings later we were collectively able to articulate what Butler “knew.”<sup>8</sup> We called it *The Problem-Solving Style* (PSS). There was another implicit approach among the team members that we also were able to describe that contrasted strongly with PSS. We labeled it *The Settlement-Oriented Style* (SOS). The two styles had contrasting goals, very different decisionmaking “scripts,” and

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<sup>7</sup> Kenneth Kressel, *Fran Butler: Questions that Lead to Answers in Child Custody Mediation*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 17 (Deborah M. Kolb ed., 1994).

<sup>8</sup> *Id.*; Kressel et al., *supra* note 1.

discernibly different impacts on the mediation process and its outcomes. Both approaches could be helpful, but PSS was better, particularly for difficult cases. All of this became clear to us only after many, many months of reflective case debriefings, because the two styles, while very different from each other, were in the category of what psychologists and philosophers call tacit knowledge, hidden somewhere in the unconscious of team members. We could make the two contrasting styles explicit only by adopting systematic reflective procedures to bring this tacit knowledge into our conscious awareness.

The simpler of the two approaches was the Settlement-Oriented Style. The mediator enacting SOS appeared primarily concerned with getting a settlement as quickly as possible. A mediator operating in this tacit style relied on a behavioral script that focused exclusively on the surface positions of the parties and sought to reconcile their differences with a *mélange* of strategies including exhortations to cooperate, warnings about the financial and emotional costs of continued conflict, praise for efforts at problem-solving, and brainstorming. The implicit SOS decisionmaking script also attached great salience to maintaining neutrality and appeared to be based on the assumption that the primary responsibility for problem-solving rested with the parties. When they were motivated to end their legal dispute, SOS could be a useful vehicle to that end, helping them exit the legal arena with a modicum of efficiency. However, in cases in which the parties were deeply polarized SOS was less successful: agreements were either not reached or, if reached, were likely to break down.

The Problem-Solving Style represented a very different approach. Mediators operating in the PSS mode appeared less concerned with the narrow objective of settlement and much more interested in the orchestration of a process of quality problem-solving. This process focused on identifying the reasons the parties' own efforts to resolve their differences had broken down and using what was learned to depolarize the conflict. The behavioral script associated with this objective began with an initial period of intense question asking that we labeled the *interrogatory style*. Using the interrogatory mode, PSS mediators appeared to be actively generating, testing, and refining hypotheses in their own minds about the sources of the conflict, a mental activity that was typically confirmed during our case conference discussions. The visible result was that the mediator was ultimately able to present the parties with considered proposals for breaking impasses. In contrast to the proposals of the SOS mediators, however, these suggestions were well embedded in an understanding of the dispute and the circumstances in which the parties were constrained to function. The parties were encouraged to react to and modify the mediator's proposal, in a

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distinctive “working through” stage, with the mediator playing an active and directive role, while respecting the parties’ feelings and perspectives. The Problem-Solving Style produced a more focused, structured and vigorous approach to conflict resolution than the Settlement-Oriented one; resulted in more frequent and durable settlements, especially in high conflict cases; and produced a more favorable attitude toward the mediation experienced. SOS was not necessarily bad, but PSS was better.

The Essex County study established a number of important themes about how to study mediator decisionmaking (although at the time I did not couch what I was learning in decisionmaking terms).

The first theme was that expert mediators (like Fran Butler) often know much more than they can say and that many of the more interesting and useful things they know are of this type. The study also illustrated that less expert performers also know more than they can say. The SOS model was of this type. Making both models explicit was motivating to our team and made learning to use PSS easier (although not necessarily easy for those team members more strongly wedded to SOS). Eventually we developed a successful training program to teach PSS to others.

The study also helped shape my thinking about the reflective learning process. Among other things it established in my mind the scientific legitimacy of reflective self-study as a vehicle for doing research that would be useful for practice. The project also helped me formulate some rudimentary but useful ground rules for the reflective process, including the value of case protocols to help promote systematic reflection, the need to focus on concrete intervention decisions (“why did you do that then?”), and the importance of challenging team members supportively but firmly about their intervention decisions. I later attempted to codify these and other matters in a paper on the reflective case study method.<sup>9</sup>

Finally, in trying to explain our results and justify our methods, the Essex project led me to the work of Donald Schon about reflective professional practice<sup>10</sup> and the research of Gary Klein<sup>11</sup> on expert decisionmaking in the real world. It was tonic to discover from these sources that my intuitive methods were well justified and that framing the study of mediator behavior in terms of implicit knowledge was likely to be fruitful.

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<sup>9</sup> Kenneth Kressel, *Practice-Relevant Research in Mediation: Toward a Reflective Research Paradigm*, 13 NEGOT. J. 143 (1997).

<sup>10</sup> See generally DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983).

<sup>11</sup> See generally GARY KLEIN, *SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS* (1998).

## II. THE NIH STUDY OF OMBUDS-MEDIATORS: FROM MEDIATOR STYLES TO MEDIATOR MENTAL MODELS

My paper on the reflective case study method<sup>12</sup> that my colleagues and I had used in the divorce mediation project led to an invitation from Howard Gadlin, the Director of the Office of the Ombudsman at the NIH, to use the method to help him and his colleagues improve their practice.

At the outset of the project, the requisite norms of the reflective case study method were embodied in a written document that was circulated to all team members and discussed in detail. The key injunctions were to ask the mediator whose case was being considered open-ended but focused questions, to clarify their unarticulated knowledge (e.g., “what was happening?” or “what did you feel or see at that moment?”); to summarize the mediator’s response in order to insure understanding and create “space” for reflection; to challenge the mediator in a firm, but respectful way (e.g., “why wouldn’t ‘x’ have been a better intervention here?”); and to probe for the concrete meaning of abstract terms (e.g., if “creating a trusting climate” is offered as one of the effective mediator interventions, ask how trust was created). A central part of my role as the reflective facilitator was to have the group observe these norms to the greatest extent possible.

When we began our work, staff members told me that they had no specific approach beyond an emphasis on being neutral facilitators (“every case is different”). Several years and many, many hours of reflective case discussions later, I re-learned the lesson I had learned in the family court: although they were not consciously aware of it, the ombuds team had a clear and differentiated set of ideas about practice. Their mental model consisted of two strongly contrasting intervention scripts: a Deep Problem-Solving script (DPS) focused on identifying and addressing latent issues of an interpersonal or systemic kind and a Tactical Problem-Solving script (TPS) focusing instead on the issues as presented by the parties. The tactical script was applied in either an integrative bargaining mode or a more distributive quasi-arbitration approach.

The reflective record made abundantly clear that a good deal of ombudsman energy is devoted to the frequently vexing, if implicit, question of whether the DPS or TPS script was a “best fit” to the dispute at hand. The record also suggested that making this decision rested on a reasonably well structured, if tacit, set of *decision rules*. The decision rules were of two types: *first order decision rules* concerning the existence and nature of any latent problems that may be present, and *second order decision rules*

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<sup>12</sup> Kressel, *supra* note 10.

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concerning the parties' capacity to engage in "deep" problem-solving if latent problems had been identified.

Despite their very different foci, both DPS and TPS appeared to follow the same problem-solving stages, beginning with an intensive diagnostic phase during which the decision rules were applied and a script "selection" was made. DPS was clearly the preferred intervention mode of team members. Every case began with at least a preliminary effort to search for and address latent causes, and team members expressed dissatisfaction if they could not apply DPS in cases where latent problems were thought to be fueling the conflict. However, ombudsmen used the scripts flexibly and switched to TPS if DPS was unnecessary or impractical.

The mental model of the NIH team was clearly shaped by the social context in which the ombudsmen function. Thus, the primacy of DPS in the model appears to be due to the fact that the ombudsmen are "repeat players" in the life of the NIH and therefore become adept at recognizing the latent sources of its dysfunctional conflicts; are under a strong role mandate as ombudsmen to pay attention to covert patterns of organizational dysfunction; and deal with disputants motivated to address latent issues blocking their scientific work. The ombuds mediators are also strongly identified with the NIH's core mission of promoting scientific excellence. For example, in a dispute involving the struggle of promising junior scientists to separate from senior colleagues who were blocking their path to research independence, the ombuds-mediator was a skillful agent of fostering a scientific divorce. (This type of conflict is so common in the institutional life of the NIH that the ombuds team refers to it as the autonomy drama).

Compared to the description of mediator styles in the divorce project, the account of the mental model of the NIH ombuds mediator team represents a more detailed, nuanced, and complex surfacing of the implicit cognitive structure behind mediator decisionmaking. Nonetheless, the two studies have much in common. Collectively, they suggested strongly that mediator intervention decisions do not involve choices among individual tactics or strategies, but are driven in "top down" fashion by holistic, overarching if implicit cognitive schema. The preferred schema in both studies were similar in their emphasis on searching for underlying causes of which the parties themselves were unaware and both relied heavily on mediator knowledge of what the most common and problematic of these latent events or dynamics were likely to be. These similarities I attribute to the fact that both settings provided relatively stable, predictable environments in which to learn—what

Kahneman and Klein<sup>13</sup> have called *high validity* environments. The procedure of reflective team debriefings made this learning explicit and teachable.

In trying to make sense of the descriptive accounts of our cases churned up by the reflective case procedures, I also turned increasingly to the research literature on expertise and real world decisionmaking in domains outside of mediation. This literature was largely supportive of the kinds of things, both substantive and methodological, that I was learning with my NIH colleagues and had already gotten a glimpse of in the divorce mediation project. As in our two studies, research on expertise in other domains indicates that expert knowledge typically becomes highly “automated” over time, and even inaccessible to ordinary reflection (thus, experts frequently refer to their “intuition”), unless special conditions for retrieval are provided.<sup>14</sup> The idea that expert thinking is strongly shaped by social, professional, and institutional forces is also a staple of the literature on expertise in real-world dynamic environments of the type that mediators must master. In such environments expert performance is closely linked to acute situation awareness<sup>15</sup> and the recognition of recurring patterns<sup>16</sup> of the kinds embodied in Fran Butler’s Problem-Solving Style of divorce mediation and the Deep Problem-Solving model of Howard Gadlin and his colleagues.

### III. BRINGING MEDIATOR DECISIONMAKING INTO THE PSYCHOLOGY LABORATORY

After two field studies using the reflective case method, I wanted to get at mediator cognition using a more controlled method to describe the thinking behind mediator decisionmaking. Bringing experts into the laboratory and studying their thought processes and behaviors has become a staple for researchers who study experts in other domains of practice.<sup>17</sup> I was particularly attracted to the so-called “think aloud” method in which experts are asked to perform a familiar task in their domain and report on their

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<sup>13</sup> Daniel Kahneman & Gary Klein, *Conditions for Intuitive Expertise: A Failure to Disagree*, 64 AM. PSYCHOL. 515 (2009).

<sup>14</sup> ROBERT R. HOFFMAN & GAVAN LINTERN, *Eliciting and Representing the Knowledge of Experts*, in THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE 203 (K. Anders Ericsson, et al. eds., 2006).

<sup>15</sup> Klein, *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> MICHELENE, T.H. CHI, *Laboratory Methods for Assessing Experts’ and Novices’ Knowledge*, in THE CAMBRIDGE HANDBOOK FOR EXPERTISE AND EXPERT PERFORMANCE 167 (K. Anders Ericsson et al. eds., 2006).



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thinking as they do so. The approach has been used to study the cognitive processes that distinguish experts in fields like physics and medicine from novices and journeymen.<sup>18</sup> Mediators cannot think aloud in the midst of a session but they can be asked to view their recorded video performance and report on what they were thinking as the session unfolded. This “stimulated recall” procedure has been used to study the cognition of sports coaches, teachers, and psychotherapists.<sup>19</sup>

My desire to adopt these methods to the study of mediation resulted in two interconnected investigations involving seventeen experienced mediators and five novices who were invited into the lab and asked to mediate *The Angry Roommates*, a simulated conflict between two college women.<sup>20</sup> Two carefully prepared undergraduate actors played the roles of the college roommates. The conflict was constructed to involve both surface issues (e.g. messiness, noise in the room) and deeper relational ones, since my research at the family court and NIH had suggested that latent issues could be a significant concern for some mediators.

To help us understand the nature of mediator decisionmaking, each of the mediators was asked to conduct an initial thirty-minute interview with the parties and then watch a video of their performance immediately after the session. After the stimulated recall session, the participants were interviewed at length about what had occurred in the session, their understanding of the conflict, and the degree to which their performance was representative of their general approach to practice. Subsequently, three trained observers also viewed the video of the mediation session with instructions to rate the behavior of the mediator, describe the hallmarks of the mediator’s performance, and make inferences about the kinds of tacit mediator thinking that could plausibly account for how the mediator had behaved. We learned two major things about how mediators make decisions from these procedures.

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<sup>18</sup> K. ANDERS ERICSSON, *Protocol Analysis and Expert Thought: Concurrent Verbalizations of Thinking During Experts’ Performance on Representative Tasks*, in THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE (K. Anders Ericsson et al. eds., 2006).

<sup>19</sup> John Lyle, *Stimulated Recall: A Report on its Use in Naturalistic Research*, 29 BRIT. EDUC. RES. J. 861, 861–78 (2003). See generally Keith D. Morran, et al., *Empirical Investigations of Counselor Self-Talk Categories*, 36 J. COUNSELING PSYCHOL. 505 (1989).

<sup>20</sup> Kressel et al., *supra* note 3.

#### IV. THE ROLE OF FORMAL MODELS OF PRACTICE IN MEDIATOR DECISIONMAKING.

The first thing we learned is that mediators were undoubtedly relying on *formal models of practice* to help them decide what to do. Formal models of practice exist in all professional domains. In the field of psychotherapy, for example, there are numerous formal models, all competing for the allegiance of the practitioner. Two that are familiar to the educated public are cognitive behavioral therapy and psychodynamic therapy. There are many more. In mediation we also have our formal models. They go by familiar names like facilitative, evaluative, or transformative mediation.

In whatever discipline they occur, formal models specify an understanding of basic phenomena relevant to the domain (e.g. the nature of psychopathology, the nature of polarized conflict), the goals to be sought by professional assistance, and the kinds of interventions to be used (or avoided) in the pursuit of those goals. Formal models of practice have some other characteristics. They are likely to be consciously held—experienced professionals are able to describe their model of practice clearly if asked—and widely shared among adherents. They are also helpful to practitioners: focusing their attention, guiding their behavior, and providing confidence in a demanding task.

As Figure 1 suggests, based on the judgments of our trained observers and the roleplaying disputants, collectively speaking, some familiar models of practice were alive and well in the minds of the twenty-two mediators who dealt with our angry roommates.

The methodological and statistical details behind Figure 1 may be found in the original report.<sup>21</sup> Essentially, we used a procedure called multi-dimensional scaling to aggregate the many ratings the observers and the disputants made about each mediator to allow us to see the underlying patterns of similarity/dissimilarity in how the mediators approached the *angry roommate* conflict. We also used a consensual qualitative procedure that has been used in the study of psychotherapy<sup>22</sup> to develop narrative accounts of the manner in which mediators went about their task and the tacit thinking that plausibly lay behind their behavior. Here I will simply summarize the meaning of the results displayed in the figure in terms of what they suggest about the role of formal models of practice in mediator decisionmaking and behavior. Each point in the figure represents a single mediator.

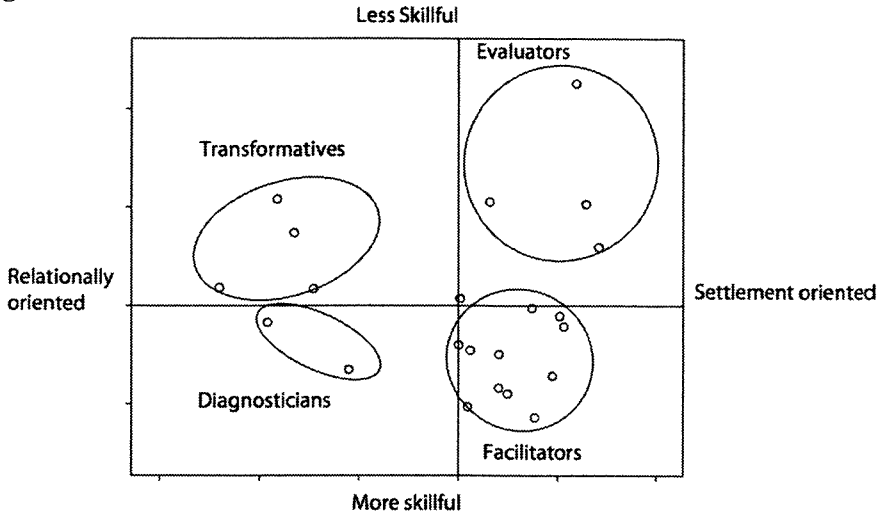
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<sup>21</sup> *Id.* at 135–50.

<sup>22</sup> Clara E. Hill et al., *A Guide to Conducting Consensual Qualitative Research*, 25 COUNSELING PSYCHOLOGIST 517 (1997).

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Figure 1<sup>23</sup>



Note: Each point represents a single mediator.

Two things immediately stand out. First, our mediators divided along a familiar settlement vs. relational orientation. Formal models of mediation practice tend to emphasize one or the other of these orientations.<sup>24</sup> The second, illustrated by the labels we have provided, is that the numerous judgements the observers and disputants made of each mediator coalesced around the hallmarks of well-known models of practice within these two orientations.

Thus, at the settlement-oriented end of the horizontal axis were two stylistic subgroups with very close affinities to the familiar Facilitative and Evaluative models of practice which Riskin's<sup>25</sup> seminal paper first described. For the eleven facilitators, the primary goal was getting an agreement that would end hostilities, and the primary vehicle for doing so was creating a positive climate and structuring a negotiating agenda. Their signal characteristic was warmth, optimism, and energy in promoting the search for agreements. They showed little interest in latent causes of the girls' difficulties with each other or exploring emotional aspects of the conflict. By

<sup>23</sup> Kressel et al., *supra* note 3 at 150.

<sup>24</sup> KENNETH KRESSEL, *Mediation Revisited*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 726 (Morton Deutsch et. al. eds., 2006).

<sup>25</sup> See generally Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

and large they also refrained from expressing their own opinion on substantive issues.

Like the facilitators, the primary goal of the four evaluators in Figure 1 was agreement making. They showed a similar lack of interest in exploring latent causes of conflict or addressing emotional concerns. The distinguishing element in their behavior was an inclination to challenge the parties when the mediator felt either of them was being unreasonable and to express, sometimes rather bluntly, what they felt was a more reasonable response to the other's concerns.

At the relational end of Figure 1, two other formal models of practice are represented. The more familiar of the two is represented by the practitioners in the top left segment of the figure. All four were explicitly identified with Bush & Folger's Transformative<sup>26</sup> approach and enacted it in a highly similar style. Their explicit objective, described in nearly identical language at the outset of the session, was to help create a "dialogue" between the roommates so that each might better explore both their own and the other's perspectives. Their most characteristic intervention was frequent summarizing of the parties' statements and a determined effort not to express an opinion or influence the agenda in any way.

At the bottom left side of the figure are two mediators we have labelled the Diagnosticians. They shared some of the same willingness to help with agreement-making that characterized the Facilitators and Evaluators, but the dominant theme in their performance was a concern with exploring the latent interpersonal, emotional, and psychological sources of the conflict—very much in the manner of the approach my divorce mediation colleagues and I stumbled upon (with the help of Fran Butler), and that Howard Gadlin and his NIH ombuds colleagues turned out to be using (despite their original disclaimers of allegiance to any formal model). This model of practice occurs in other settings as well,<sup>27</sup> although it is less well codified and distributed in the world of practice than the other three models.<sup>28</sup>

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<sup>26</sup> See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

<sup>27</sup> See generally Kenneth Kressel, *The Strategic Style in Mediation*, 24 CONFLICT RESOL. Q. 251 (2007).

<sup>28</sup> The vertical axis of the figure indicates that the observer and disputant ratings also reflect judgments about mediator skill, with the Facilitators and Diagnosticians being judged as more thorough in gathering information, as having developed a better understanding of how to help and of creating better rapport, a more comfortable climate

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Obviously, our numbers are too small to make any claims about how representative these findings are to the actual world of practice. The results do serve to illustrate the main point: Mediators are clearly influenced by formal models of practice and different mediators adopt very different models, even in a very simple dispute.

### V. BEYOND FORMAL MODELS: THE ROLE OF IMPLICIT SCHEMAS OF PRACTICE IN MEDIATOR DECISIONMAKING

The second major lesson from the *Angry Roomates* study is that formal models of practice are not the whole answer to the decisionmaking challenges which mediators face. This is still a work in progress, but we have learned enough to make a preliminary report worthwhile. Before proceeding, however, it is worth summarizing why we reasoned that the formal models of practice we identified in the first part of our analysis could only represent an incomplete guide to the task of deciding what to do in the hurly-burly of a mediation session. I can think of at least 4 such reasons:

- Mediation is a relatively new and highly interdisciplinary area of professional practice where well-established formal models are still relatively weakly defined and taught—e.g. 40-hour training programs are sufficient to qualify for many mediation panels; textbooks and other scholarly treatises on how to perform within a given model are relatively few (cf. a more well-established field like psychotherapy).
- Formal models are generic and therefore insufficiently precise—no formal model can account for the uniqueness of different conflicts/disputants and the highly unpredictable and rapid interactions unfolding in front of the mediator.
- Formal models are inevitably sifted through each mediator's unique beliefs, values, and experiences. It is these idiosyncratic characteristics that are likely to shape what mediators actually deliver and what clients experience.
- Much of mediator decisionmaking inevitably occurs at an implicit, non-conscious level, whereas formal models exist largely at the explicit, conscious level. This is the lesson of work by Gary Klein and others who study real world decisionmaking and also of the work of cognitive psychologists who have reliably demonstrated that human cognition is a dual

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and a fairer, more unbiased atmosphere. These results are less central to the issue of the role of formal models on mediator decisionmaking, so I have de-emphasized them for the purposes of this discussion.

process system, in which a good deal of cognitive activity, especially in regard to decisionmaking, occurs outside of conscious awareness.<sup>29</sup>

If formal models of practice do not provide a complete understanding of mediator decisionmaking, what else is there? We formulated our answer to this question around the concept of mediator *schemas of practice*.<sup>30</sup>

We may define a schema of mediation practice as the partly explicit, but largely tacit and highly idiosyncratic ideas the mediator holds about the role of the mediator; the goals to be attained (and avoided), and the interventions that are permissible (and are impermissible) in striving to reach those goals. As I have previously noted, these are the same concerns that formal models of mediation practice are concerned with. Although the concerns are the same there are important differences. The most salient contrasts are set forth in Table 1. The most important is the last one. Whereas formal models represent the known “textbooks” of practice, schemas of practice may be thought of as the largely uncharted “cognitive underbelly” of practice. One way to improve practice therefore, is to chart this unknown cognitive territory, particularly as it exists in the minds of our best practitioners. Essentially, this has been the task of our second examination of the data from *The Angry Roommates*.

Table 1

Formal Models of Practice	Schemas of Practice
Based on a formal theory of conflict and the role of the mediator	Based primarily on informal, “intuitive,” and personal “mini-theories” of conflict & the role of the mediator
Explicit and self-conscious	Partly explicit, but with a large implicit component
Widely disseminated in the community of practitioners (the “textbooks” of practice)	Largely ‘hidden’ within the practice community (the “cognitive underbelly” of practice).

<sup>29</sup> DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).

<sup>30</sup> We could as well have used the term “mental model” of practice as Howard Gadlin and I did in the NIH study. I have not had time to debate the pros and cons of terminology, so I will stick with the “cognitive schema” usage that we spontaneously adopted (perhaps because in my home discipline of social psychology it is more familiar and well-worn).

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This examination was based on additional assumptions about schematic knowledge derived from the studies at the family court and NIH, and from my reading of the literatures on expert judgment, decisionmaking, and social cognition. The main assumptions were these:

- Schemas of practice may be viewed as mediator coping responses to the complex and demanding task of intervention decisionmaking and the limitations of formal models of practice and conscious human deliberation. In the language of the cognitive psychologist, Gerd Gigerenzer, their component elements may be thought of as tacit *adaptive rules of thumb*<sup>31</sup> suited to the particular environments in which the mediator typically works.
- Every schema of practice contains inherent tensions; none is likely to be a perfect “solution” to intervention decisionmaking. This is because the task of mediating is inherently complex, permits multiple solutions, and is ambiguous as to what qualifies as a “successful” result. (In the words of cognitive psychology, mediation is a domain that deals with “ill-defined problems.”)
- There will be a poor to moderate fit between the explicit elements of the mediator’s schema—what the mediator is consciously aware of and can easily talk about—and its implicit elements. This gap is the consequence of the notion that human cognition depends on a slower, more self-aware, labor intensive System 2, and a more rapid, more efficient, but largely unconscious System 1.<sup>32</sup> The decisionmaking climate that generally prevails in mediation—the need for repetitive, rapid decisions about complex matters—distinctly favors a reliance on System 1 thinking. A corollary of this fact is that the mediator’s schema of practice, which is weighted more to tacit, nonconscious knowledge, is likely to exert a greater influence on the decisionmaking process than the mediator’s reliance on a formal model (or models) of practice.

My colleagues and I developed a case protocol to explore these assumptions and used it in a consensual procedure similar to the one we had

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<sup>31</sup> GERD GIGERENZER, *GUT FEELINGS: THE INTELLIGENCE OF THE UNCONSCIOUS* 47 (2008).

<sup>32</sup> Kahneman, *supra* note 30.

used in the first stage of our effort. The protocol contained questions on several major topics: *What are the key components of the mediator's schema of practice? What "tensions" are detectable in the mediator's schema? How does the mediator appear to cope with the inherent limitations that his or her schema poses? In particular, how flexible is his or her behavior as the disputants react to his or her decisionmaking moves and how reflective does the mediator appear to be as he or she reviews his or her performance during the stimulated recall session and the post-mediation interview?*

We have thus far analyzed seven of our eight exemplar mediators. Obviously, ours is a very small sample, even when fully analyzed, and the study itself is highly exploratory in nature. Nonetheless, we have learned some interesting things about the characteristics and consequences of schemas of mediation practice. Here is a list of the most striking ones so far:

*A. Different Schemas of Practice May Involve Very Different Ideas About Basic Phenomena and How They Relate to the Mediator's Task*

For example, the notion of "conflict" took on a variety of contrasting meanings (sometimes explicit, sometimes inferable from mediator behavior). Thus, in the schema of some of our exemplars, "conflict" was a phenomenon of considerable curiosity and interest, and as offering creative opportunities for problem-solving. In the schema of other exemplars, "conflict" was more the sign of a "problem"—inevitable and necessary, perhaps—but one primarily in need of being "contained." Perhaps because of this fundamental division, other important phenomena were also defined very differently. Thus, for some of our exemplars, emotionality had the positive status of conveying important and useful information, whereas in the schema of others, emotion had the status of an impediment to rationale problem-solving that needed to be carefully managed and dampened. Notions of rapport and empathy showed similar difference. Thus, two of our exemplars were extremely good at expressions of empathy and establishing rapport with the disputants, but the motive seemed primarily to use these capacities as a surface "lubricant" to smooth the path to agreement-making (as in the adroit use of humor); for two other exemplars with similar skills, empathy and rapport seemed more the expression of a deeper curiosity and reflective interest in the dispute.

*B. The Explicit Elements of a Mediator's Schema of Practice May be Contradicted by the Implicit Elements.*



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Many of the mediators with a settlement-oriented schema of practice talked explicitly of having a “win-win” as a primary goal. As we all know, in formal models of practice, especially the facilitative one, win-win language refers to the process of getting beneath positional bargaining by surfacing each side’s underlying needs and interests in an effort to find such solutions.<sup>33</sup> However, observers saw almost no such efforts on the part of mediators with an ostensible facilitative orientation. Instead, what they saw with considerable frequency was a search for compromise around the surface positions that each roommate had staked out, with little or no probing for the interests or needs underlying those positions.

Mediator RJ provides another illustration of the gap between the explicit and tacit elements in a mediator’s orientation. In Figure 1, he was classified as one of the evaluative mediators. In the pre-mediation questionnaire, RJ described himself as highly eclectic. His goals included both settlement (“a mutually acceptable agreement”) and relational ones (“an improved future relationship”), and the behaviors associated with each (“fact-finding, analysis, and counseling”). He explicitly rejected “brow-beating, intolerance, and decisionmaking.” Overall, stylistic eclecticism of this kind is what the majority of mediators report when asked to describe their approach.<sup>34</sup> However, his in-session behavior revealed that his tacit schema of practice allows wide scope for evaluative behaviors and few of the kind one would expect in a relational, “counseling” orientation.

### *C. Schemas of practice can be “simple” or “complex.”*

Perhaps the most encompassing contrast between schemas of practice in our exemplar sample is captured by the distinction between simple and complex schemas. Of the seven mediators on whom we have completed analysis, four had schemas of practice of the simple variety and three of the more complex type. The differences between the two kinds of schema are set forth in Table 2.<sup>35</sup>

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<sup>33</sup> CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 231 (2d ed. 1996).

<sup>34</sup> See generally Lorig Charkoudian, Cristian de Ritis, Ramona Buck & Carrie L. Wilson, *Mediation by any Other Name Would Smell as Sweet—or Would it?*, 26 CONFLICT RESOL. Q. 293 (2009); Cheryl A. Picard, *Exploring an Integrative Framework for Understanding Mediation*, 21 CONFLICT RES. Q. 295 (2004).

<sup>35</sup> The remaining mediator had a schema that seemed to fit somewhere between simple and complex.

Table 2  
Implicit Mediator Decisionmaking Schema

Simple Schemas	Complex Schemas
More reliant on a formal model of practice (either relational or settlement)	Less reliant on a formal model of practice
Involve simpler intervention strategies and more straightforward “linear” procedural scripts	Involve a diversity of intervention strategies and nuanced procedural “scripts”
Involve lower levels of <i>decisional stress</i> for the mediator	Involve more <i>decisional stress</i> for the mediator (e.g. when, whether, and how to move from relational to settlement objectives)
May be associated with <i>less motivation for reflective learning</i>	May be associated with <i>more motivation for reflective learning</i>
May be executed well or less well	May be executed well or less well

Simple schemas appear to depend very heavily on a formal model of practice, whether consciously or not. Thus, two of our exemplars were articulate and explicit adherents of the Facilitative settlement style, and one of the Transformative model. In their pre and post-settlement statements, in-session behavior, stimulated recall session, and post-mediation interviews, all three were well aligned with their respective formal approaches to practice. In the case of RJ, as already noted, his explicit allegiance was with an eclectic orientation with settlement and relational goals, but his performance and thinking made it apparent that his mediational heart (at least in this conflict) was strongly aligned with an evaluative approach to practice.

Mediators with simple schemas also appeared to favor clear, linear behavioral scripts, largely as a reflection of their reliance on their formal models. For the two Facilitatively inclined exemplars, the behavioral script involved a “straight as an arrow” progression of agenda setting, encouragement of an exchange of proposals, assistance with idea generation (via brainstorming) when the parties’ negotiating efforts foundered, and a closing summary of the terms agreed to—the entire performance leavened

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with encouragement and praise. For the Transformative exemplar the behavioral script was even simpler: a determined focus on reflecting back to the parties what they had been saying with an occasional question about what the parties wanted to talk about when exchanges halted.

Reflecting their straightforward and well-practiced scripts, mediators with a simple schema showed little evidence of decisional stress as they reported on their thinking in the stimulated recall session or talked about their performance in the post-mediation interview. For the most part they were satisfied with what they had done and that they had proceeded in a prescribed manner in which they believed. This loyalty appears to have left little room for reflective curiosity as they watched themselves mediating or talked about the case in and after the stimulated recall session. While there was an occasional regret, confidence that a prescribed model had been followed seemed to hold in check any serious self-scrutiny.

MP, for example, who was strongly identified with the Transformative formal model, was open to self-doubt and a degree of reflection about his performance. However, these efforts were narrowly confined to his predominant strategy of summarizing the girls' statements. MP might argue that if the process went on long enough and involved a real conflict, recognition and empowerment would eventually occur by these means. Perhaps. However, it was his failure to ask questions and give the disputants more opportunity to put information on the table that seemed to the observers to impoverish the dialogue he was intent on creating. But his simple schema of transformative practice ironically made it hard for him to benefit from the stimulated recall session. MP was self-critical as he watched himself on the video, but could not learn much because what he cared about (e.g. that he was not more "crisp" in some of his summaries) did not seem to the observers to be what was at the heart of his poor performance.

Simple schema had an uneven relationship to observer judgments about the quality of mediator performance. In the two instances in which the simple script was based on a facilitative formal model of practice the mediators received very high ratings from the roleplayers, but the observers were less sanguine, largely because they were aware that several important latent elements built into the conflict were never dealt with or even recognized by the mediator. In the two cases where a simple schema rested on an evaluative (RJ) or transformative model (MP), the disputants and the observers were far less satisfied. One possible explanation may be that in these two cases the simple schemas influencing the mediator's performance provided a very narrow range of behavioral options that notably did not include responding with praise or enthusiasm to the parties' negotiating efforts.

In direct contrast with the characteristics of simple schemas displayed in Table 2, complex schemas were far less reliant on a formal model of practice, involved a more diverse and nuanced set of behavioral scripts, more decisional uncertainty and stress for the mediator, and were associated with more efforts at reflective learning in the stimulated recall session and the post mediation interview. As with the simple schemas of practice, however, complex schema could be executed well or less well.

GN, classified as following a Diagnostic formal model of practice in Figure 1, illustrates many of these qualities. Her performance as well as her explicit thoughts about the mediation and the session itself reflects a schema with multiple allegiances to various formal models, with the exception of the evaluative approach that she explicitly rejected. She was quite clear that the *context* in which mediation occurs should influence what the mediator does and how the mediator thinks about their role, a point of view that, amazingly enough, no other mediator expressed. She commented:

“My approach typically relates to context. E.g. in REDRESS [the US Postal service mediation program] I would assume a transformative approach [mandated by that program]; In EEOC I would probably use a combo of transformative and facilitative, with more of a thrust toward settlement. In divorce mediation—transformative and a lot of problem-solving.”

Her identification with a multiplicity of approaches was associated with a skillful blending of settlement and relational emphases. In the beginning of the session GN tried to help the disputants address their broken friendship, the relational focus encouraged by her strong allegiance to a Transformative model of practice. The girls were not ready for this, however, responding defensively and with mutual accusations. GN backed off, and followed the girls’ inclination to address the surface issues in their conflict. In this phase, which occupied a long period in the middle of the session, GN performed very much like the more skillful mediators with a settlement-only schema, making suggestions, exploring practical details, and trying to help the parties listen to each other for possible areas of compromise.

Toward the end of the session, after the negotiating mode had begun to bog down in nit picking and defensiveness, there was a dramatic shift into relational issues, when GN asked: “Do you guys ever have a chance to hang out anymore?” The rest of the session was devoted to exploring what caused them to lose touch and efforts to help them explore how they felt about the loss of contact and what might be done to recapture their friendship. This shift back into GN’s preferred relational mode gave something of a

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triumphant and meaningful focus to the session in which the girls seemed very much engaged.

The implicit decision rule behind GN's entire performance seemed to be: "First meet the parties where they are; once rapport has been established and their initial desires addressed, see if you can help them explore the deeper, more difficult to talk about relational and emotional issues in their dispute."

A schema with multiple goals and decisional choice points would seem, inevitably, to place more decisional stress on the mediator. Quite simply, there is more to decide about than there is in the case of simple schemas of intervention. MK, a mediator with a complex schema, much like GN's, spoke several times about such stress. For example, in the stimulated recall session she stopped the video to comment on her struggle to either stay with the surface issues the disputant was talking about or attempt to explore more latent psychological material:

I'm thinking here—when she said, "She's acting worse than my mom"—in my psychology head I was thinking about all the psychodynamics involved with parenting and family relationships; and I thought that this must feel like to her like a very infantilizing experience right at the time when she's wanting to be autonomous and be grown up. But that was too complicated of an issue to bring up, *because I didn't quite know how to do it.* So, I opted to let the moment pass and see what she would do and follow that and maybe come back to that later (*italics added*).

Complex mediation schemas may also be characterized by a relaxed capacity for reflective learning, both during and after the mediation experience. MK's remark, above, is a good illustration. (Schon has referred to such thinking as "reflection in action.") Several more examples could be cited both from MK's and GN's stimulated recall sessions and post-mediation interviews.

One could argue that to enact complex schemas well, such openness to reflective learning may be mandatory. SM, who also had a complex schema containing both relational and settlement goals and diverse intervention scripts, had much less patience with herself, tending to be both sharply self-critical as she watched her performance and simultaneously self-accepting ("that's how I do things; they have to take me as I am"). Although the roleplayers gave her generally high marks for her energy and evident commitment to trying to help, the observers felt that she executed her complex schema far less adroitly than GN and MK, and learned less from the experience.

D. *A Practitioner's Schema of Practice May Block Access to Other Useful Knowledge the Mediator Possesses.*

The relationship between schemas of practice and a mediator's capacity for reflective learning is one illustration that schemas of practice can have important consequences. Another consequence is that a practitioner's schema may block the mediator's access to useful knowledge that they possess.

For example, HJ, in addition to being a mediator, is also an experienced master's level psychological counselor who works with families. However, in the post mediation interview he commented: "A lot of times, once you're working with families, you start peeling away a little bit and there's usually something underneath. *Mediation's a little bit different. People are more on the table about what's bothering them and they don't see it as a lot of underlying problems.*" (italics added). What is fascinating here is how JH's mediation schema leads to an unexamined assumption about the disputants. They, in fact, were very much primed to talk about important latent issues fueling their conflict (e.g. a cafeteria incident in which one roommate pointedly ignored the other) but were instructed only to do so if probed in a relevant way (as GN did when she asked, "do you guys hang out anymore?"). Another illustration: MP's mediation performance, his stimulated recall protocol, and most of the post-mediation interview suggest that he may lack psychological insight altogether. Only when the interviewer presses him does he reveal a deeper understanding of the conflict.

Interviewer: *What do you think is causing the conflict?*

MP: [This is] not an analysis I would do as a mediator at the time of mediation. I'm perfectly happy to do it right now. See, *I'm your mediator. I'm not your conflict consultant.* [italics added]. There's kind of a difference. . . Christine needs a more regulated environment in terms of neatness and from Monica's point of view that's creating an atmosphere of restrictiveness that's difficult. Then there's sort of a psychological level . . . Christine was saying that Monica was just this irresponsible slob who is sort of valueless. And, in fact, what she, Christine, isn't saying is that Monica went to her and tried to open this up; to talk about it.

Interviewer: *Are you speaking of the cafeteria incident?*

MP: Yeah. What I went with is that she felt closed down . . . *it's not my intent to smoke this kind of stuff out. In a real mediation, if it really mattered it would have cycled back.* [Italics added].

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MP's rationale is consistent with his strict adherence to a formal Transformative model and his translation of that model into his own "simple" schema of practice. It is arguably possible that if the conflict was real and more time was available that the emotional currents would have "cycled back." In point of fact, however, GN, who shared MP's Transformative background, did engage the latent psychological issues to good effect in our brief simulated dispute.

### *E. The Effectiveness of a Practitioner's Schema is Partly a Function of "Fit."*

The effectiveness of different approaches to mediation practice is a subject on which there is notoriously little sound empirical data. Jim Wall and I have just edited a forthcoming issue of *Negotiation and Conflict Management Research* devoted to research on mediator style that makes this abundantly clear.<sup>36</sup> Our *Angry Roommates* study, of course, has no direct bearing on this matter, given our very small sample. However, there are interesting suggestions that the success of an approach to practice is likely to be affected by a number of factors besides how skillfully the mediator enacts their schema.

One of these candidates may be the parties' expectations or needs. Our college student roleplayers reserved their most favorable ratings to the two exemplars who possessed what I have referred to as simple facilitative schema devoted largely to a well-structured negotiation around a search for compromise solutions to their positional stances, leavened with lots of encouragement and non-judgmental energy. This approach seemed to match the girls' expectations of mediation and perhaps fit better with the developmental needs of young adults embroiled in a conflict that had the quality of a family squabble among siblings. They were much less happy with mediators who seemed to want *them* to take the lead (those exemplars with a narrow transformatively based schema) or who were more judgementally parental.

Another determinant of how well a mediator's schema works in a particular dispute may be the degree to which the conflict fits with the *mediator's* interests and needs. MT, for example, was a seasoned lawyer with an extensive and successful background mediating complex business and personal disputes who very much enjoyed the analytic challenges which such conflicts often pose. A dispute between two college roommates revolving

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<sup>36</sup> James A. Wall & Kenneth Kressel, *Research on Mediator Style: A Summary and Some Research Suggestions*, NEGOT. CONFLICT MGMT. RES. (forthcoming).

around hurt feelings may have been too inconsequential to engage him, as his dry, disengaged tone and abrupt ending of the session suggested. The virtues of his schema might have been more apparent in a conflict more to his liking. Mediator “personality,” however vague a term that may be, may also aid or hinder the impact of the mediator’s schema of practice. Ordinarily, we would expect mediators to be inclined, consciously or otherwise, towards schemas that suit their temperaments and proclivities. This appears to have been the case with JA and HJ. JA, by her own admission, is a person who relishes structure. She has a sunny disposition, likes people, and is not inclined to search for ambiguity in human relationships. These qualities translated into an enthusiastic embrace of a schema of practice emphasizing a well-structured, supportive orchestration of negotiations around surface issues. HJ’s good-humored, “hail fellow well met” persona was likewise a good fit with his similar schema of practice.

In the case of SM, however, schema and persona fit much less well. She had a complex schema that emphasized both settlement and relational goals and an extremely open-minded embrace of any and all strategies that might assist her in reaching those goals. Unfortunately, she was also highly self-critical, impulsive at times, and impatient for results. These qualities left her limp and dissatisfied by the time her experience in the lab was over.

## V. WHAT NEXT?

The studies my colleagues and I have done indicate that neither unexamined intuition nor the reliance on formal models of practice provide anything like a complete account of how mediators decide what to do under the demanding and uncertain conditions under which they work. We have learned that tacit knowledge, which we have variously described under headings like mediator “styles,” “mental models,” or “schemas of practice,” play a powerful role in such decisionmaking; are often at striking variance with what practitioners consciously believe they are doing; and can be gotten at by methods that help practitioners access their tacit decisionmaking knowledge. All of these ideas are totally consistent with what researchers who study real-world decisionmaking and professional expertise in other domains have been learning. They are also likely to have immediate pay-offs in improving practice for the experienced mediator and for the development of training programs tailored to the very different contexts in which mediators are expected to perform.

This being the case, I am convinced that we must promote efforts to engage mediation practitioners in reflective, case-based research. The dominant research models in the study of mediation assign priority to



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precision, control, and the aggregation of data. As far as I can tell, however, they have had very little impact on practice, other than to reassure nervous provider organizations that mediation “works.” Reflective research, on the other hand fits naturally with the practical concerns of mediators and the pragmatic, case-oriented way of thinking that mediators are already inclined towards when they talk shop with each other. The trouble with shoptalk, however, is that it is relatively infrequent, unsystematic, and evanescent. To engage practitioners in something more useful a number of things are needed.

First, we need to develop clear, well-structured methods of reflective research. Fields that have developed clear and widely accepted templates for research tend to advance more rapidly. The basic components of a template for reflective research about mediator decisionmaking include systematic protocols for case reflection, norms of reflection designed to counter evaluation apprehension and group think, and the use of a reflective facilitator/observer.<sup>37</sup> The research my colleagues and I have done has established these basic parameters. However, there is more to be done on the methodological front. One step is to move towards reflective methods based on in vivo observation of mediators at work, rather than relying exclusively on the retrospective recall of the mediator. Our lab study was based on this idea, but in vivo studies of real conflicts would be preferable to the simulated method we used. Kathleen Moore, one of the ombuds-mediators in the original NIH study, has been experimenting with an in vivo model in the training of interns and new staff members at the NIH and the early returns are encouraging.

Studying novices or journeymen can tell us something about how expertise develops, but I also believe that we need to focus primarily on the decisionmaking of expert practitioners and of high profile groups of expert practitioners, like those at NIH, in our federal court systems, or in influential mediation provider organizations. We will get a bigger bang for our buck if we did so. However, identifying truly expert mediators is a challenging task. Since we lack the kind of objective measures of expertise in mediation that we have in say chess or sports, we are bound to rely on some type of consensual agreement about who the competent mediators are whose practice we should be studying. One way to start is to focus on the selection of expert mediators within a well-specified domain of practice who have a consistent reputation among their colleagues and clients for being helpful and skilled. The next step might be to screen this group further. Not every expert is a

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<sup>37</sup> See generally Kenneth Kressel, *Practice-Relevant Research in Mediation: Toward a Reflective Research Paradigm*, 13 NEGOT. J. 143 (1997).

good candidate for reflective research. To participate constructively in the reflective enterprise requires tolerance for ambiguity, cognitive flexibility, and ego-strength. It would be useful to bear such qualities in mind when soliciting mediators to participate in our studies.

Another methodological need is to develop methods that are feasible. Mediators are busy people and the methods my colleagues and I have used are highly labor and time intensive. We need to develop methods that can be used by individual practitioners or small groups of practitioners that keep such costs to a minimum, but are systematic enough to be informative and rewarding.

In planning reflective research I also think we need to be mindful of the very different contexts in which mediation is practiced. The practitioner literature on mediation is notorious for paying scant attention to these contextual matters.<sup>38</sup> Mediating in the shadow of science presents very different cognitive challenges, opportunities, and pressures than mediating in other very different environments. That is why the mental model of the NIH team, with its robust preference for a latent cause intervention script and the decision rules that support it, looks so different from the mental models we may infer from accounts of seasoned mediators working in labor mediation;<sup>39</sup> international conflict;<sup>40</sup> or on cases referred to mediation by the civil courts.<sup>41</sup> Accordingly, comparative studies of mediator cognition in very different settings are needed, since so much of the writing about formal models of practice and so many of our training programs are based on an unexamined notion that “one size fits all.”

It is not yet clear on what dimensions the sites in such comparative research should be selected, but the studies my colleagues and I have done suggests a list that would include whether or not the mediators are “embedded” in a particular institutional context with which they are highly identified (as in the NIH case) and whose patterns of dysfunctional conflict

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<sup>38</sup> D.G. Pruitt, *Mediation at the Millennium*, in HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 395–411 (M. S. Herman ed. 2006)

<sup>39</sup> Jeanne M. Brett, Rita Drieghe & Debra L. Shapiro, *Mediator Style and Mediation Effectiveness*, 2 NEGOT. J. 277, 277–85 (1986). See generally DEBORAH M. KOLB, *THE MEDIATORS* (1983).

<sup>40</sup> Jacob Bercovitch & Su-Mi Lee, *Mediating International Conflicts: Examining the Effectiveness of Directive Strategies*, 8 INT’L J. PEACE STUD. 1, 1–17 (2003). See generally Saadia Touval & William I. Zartman, *Mediation in International Conflicts*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION (Kenneth Kressel & Dean G. Pruitt eds., 1989).

<sup>41</sup> See generally James A. Wall & Suzanne Chan-Serafin, *Processes in Civil Mediations*, 26 CONFLICT RES. Q. 261 (2009).

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they come to know well; have opportunities for case consultation with colleagues; deal with disputes involving parties with ongoing relationships who are negotiating about more than just money; and are not under intense time pressure (real or imagined) to settle in an hour or two. In settings in which all or most of these elements are present, we would predict that mediator decisionmaking—at least among the most competent practitioners—would rest on very different tacit schemas of practice than in those settings in which these factors are absent. I am very much in favor of collaborative multi-site programs to pursue this key hypothesis.

Finally, I believe that it would be enormously helpful in the pursuit of the agenda I have outlined if it had the imprimatur and practical support of high profile organizations within the ADR community. The domain of professional practice mediation can no longer be considered as being in its infancy. It is now entering its fourth decade as a widely practiced and often well-remunerated activity. Yet there are troubling signs that the field is not advancing in its knowledge about what constitutes competent practice at anything like the rate one might wish. For example, while the formulation of formal models of mediation practice has been proliferating since the 1990s—25 new models by one recent count<sup>42</sup>—there has been little sustained attention to how mediators actually implement these models or think about them, especially at the tacit level that our work has shown to be so difficult to predict from what mediators are consciously aware of. Research of this kind is likely to be time-consuming, costly, and even difficult for many individual provider organizations to understand.<sup>43</sup> To have an impact the findings will also need to be disseminated and taken seriously by the practice community.

For these purposes there is no substitute for strong institutional leadership. The Dispute Resolution Section of the Bar Association, the Association of Conflict Resolution, and state and local mediation organizations have made efforts along these lines, but I believe that much more sustained and collaborative efforts are needed if we are to have the kinds of research that matters to practice.

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<sup>42</sup> James A. Wall & Timothy C. Dunne, *Mediation Research: A Current Review*, 28 NEGOT. J. 217, 217–244 (2012).

<sup>43</sup> See generally E. P. McDermott, *Discovering the Importance of Mediator Style—An Interdisciplinary Challenge*, NEGOT. CONFLICT MGMT. RES. (forthcoming); Lisa B. Bingham, *Transformative Mediation in the U.S. Postal Service*, 5 NEGOT. CONFLICT MGMT. RES. (forthcoming 2012); Wall & Kressel, *supra* note 37.

